The Court noted that the issues before it did not involve any question of discrimination or any question of revenue to the company. It was concluded that the activities of NYT with respect to its relationship with the petitioner were not subject to regulation by the PSC.

The final case to be here cited is Case 21548 - Complaint of West Elmira TV Cable Company, Inc. of the Refusal of New York Telephone to Permit Attachment of Complainant's Television Cable System to the Telephone Company's Poles. In its opinion, which was issued on January 17, 1961, the PSC noted that NYT had refused to permit the attachment of complainant's cable system to poles in the Town of Elmira despite the fact that NYT was apparently permitting such use by one of complainant's competitors in the same territory. In dismissing the complaint for lack of jurisdiction, the Commission stated:

> "In an opinion approved by the Commission on September 29, 1958 in Case 19001, we held that we had jurisdiction to pass upon a complaint such as the present one. However, subsequent to that determination the decisions of the courts in Matter of Gamewell Co. v. PSC, 8 App. Div. (2d) 232 (3rd Dept., June 17, 1959), leave to appeal denied 7 N.Y. (2d) 706; National Merchandising Corp. v. PSC, 5 N.Y. (2d) 485 (April 9, 1959) and Matter of Ceracche Television Corp. v. PSC, (Supreme Court, Albany County Special Term, March 11, 1960) have cast considerable doubt upon the asserted jurisdictional basis upon which that decision rests."

By an order issued on February 14, 1961, the PSC dismissed a petition for reconsideration and the matter was not appealed.

For purposes here pertinent, some of the more salient conclusions to be drawn from the cases cited above are as follows:

Following the decision of the Solomon Court, the PSC, in the Antenna Systems case, applied the concept of limited jurisdiction to include within its cognizance at least some aspects of the relationship between CATV and the utilities. Subsequently, the concept of limited jurisdiction was clarified in the National Merchandising Corp. case. With this clarification in mind the Ceracche Court specifically rejected the PSC's rationale as enunciated in the Antenna Systems case.

What emerged was the proposition that contractual relationships between utilities and CATV with respect to pole attachments are non-utility activities over which the PSC cannot assume jurisdiction. The Solomon Court indicated that jurisdiction could be exercised to prevent discrimination and to maximize revenues to a reasonable extent on behalf of the regulated company. In its Ceracche decision, the PSC gave specific recognition to jurisdiction in these limited areas, but the Ceracche Court simply noted these jurisdictional areas in a passing reference; the Court did not appear to reaffirm the PSC's jurisdiction over these areas in the context of pole rentals to CATV. Interestingly, in its West Elmira decision (post-Ceracche) the PSC refused to entertain a claim of discrimination.[10/]

10/ The PSC noted that an alternative was available under NYT's channel service tariff.

Decisional authority has left considerable doubt as to the extent to which the PSC can exercise "limited jurisdiction" over the rental of pole or similar space to non-utilities. Certainly the PSC has an obvious interest in the activities of regulated companies, and it has the power to investigate these activities to the end that the PSC can be assured that full and adequate service is maintained and that the utility ratepayers are in no way subsidizing non-regulated activity. Certainly the PSC can take appropriate action with respect to pole attachment practices if it appears that utility plant is likely to be impaired or in cases where impairment has actually occurred.11/ As one utility brief has suggested, however, the jurisdiction to protect ratepayers is co-extensive with the need to protect. To go further would breach obvious limits on the PSC's jurisdiction.

Viewed strictly in the context of pole attachment and related agreements between the utilities and CATV, it is highly questionable whether the PSC has jurisdiction to consider matters pertaining to discrimination or the maximization of utility revenues. At the outset it should be noted that there was no issue of discrimination nor any issue involving the maximization of utility revenues before the Solomon Court; opinions following that decision, therefore, relied upon dicta to a large extent. Aside from that fact, however, it must

11/ The Solomon Court noted that the PSC had properly assumed jurisdiction over ordinary listings in the classified directory and while the PSC did not have the same jurisdiction over advertising, it had responsibility to see that advertising does not unduly interfere with those ordinary listings where the PSC's jurisdiction applied.

be remembered that the Solomon Court was dealing with classified advertising, a relatively uncomplicated business arrangement in no way dependent upon business peculiarities for its terms and conditions, and wherein a simple contract form available to all would negate any claim of discrimination. At page 640 of its decision, the Court said, in pertinent part, "... the propriety of the form which the telephone company uses is of no concern to the Commission, so long as the form is one which is used for all advertisers without discrimination and so long as its use does not unduly hamper the obtaining of advertising revenue from the classified directory."

A far different situation pertains as to pole rental agreements. Here discrimination can exist within the context of a contract as well as in the absence of one. Since different business and operating conditions pertain to different CATV companies, the assessment of a claim of discrimination would necessarily involve a determination of reasonableness.12/ The power to cure an unreasonable discrimination is tantamount to possessing the power to fully regulate. In this context, then, the PSC would necessarily have to regulate contractual terms and conditions as well as rates. In other words, the PSC would have to step far beyond those jurisdictional bounds prescribe by statute and as clarified by the courts.

12/ The Petitioner has criticized the fact that NYT and Niagara Mohawk use only one form of pole attachment agreement.

The authority to maximize utility revenues would necessarily entail a similar scrutiny. As noted, the PSC can certainly assure itself that utility ratepayers are not subsidizing CATV, but this authority would not require a finding of what rates are reasonable above cost. Furthermore, the maximization of revenues through the exercise of jurisdiction by the PSC would be no favor to CATV. A clearly stated intention of the Legislature in enacting Article 28 of the Executive Law was to foster and promote the development of the CATV industry. That intent and those goals may not be satisfied by the PSC's insistence of revenue maximization without it being able to fully evaluate impact on the industry and individual CATV companies.

In an argument designed to ascribe to the PSC some responsibility for the implementation of Article 28, the Association has contended that it is a well-established principle of administrative law that an agency cannot ignore policies embodied in other statutes in fulfilling responsibilities under its own statute. This, the Petitioner has argued, is true even where the agency does not have primary jurisdiction with respect to those policies. Citing the McLean Trucking Co. case, supra, the Association noted that the Supreme Court held that in considering an application for merger by motor carriers the Interstate Commerce Commission (ICC) could not wholly ignore the national policies contained in anti-trust legislation even though once a merger was approved by the ICC, it was exempt from anti-trust laws. The Association's position in this regard is untenable. Certainly there are times upon taking affirmative action

when an agency should consider the impact of that action in the light of other pertinent legislation. No affirmative action is here contemplated. The Petitioner's position is tantamount to advising the PSC that it is free to regulate wherever it chooses. The PSC cannot look to other laws for a jurisdictional mandate that cannot be found in its own enabling statute.13/

The rental of pole or similar space by utilities is not part of the public service performed by those utilities. It must be concluded that the PSC is without jurisdiction to regulate with respect to pole attachment and related agreements between the utilities and CATV companies except that the PSC has authority to investigate such arrangements and to issue such orders and directives as are necessary to ensure the adequacy of service and to protect the interests of utility ratepayers.14/ In view of this jurisdictional limitation, therefore, it is further concluded that the PSC is without authority to entertain the complaints raised by the Association in its Petition for Investigation dated March 26, 1973.

13/ A related argument could be made by virtue of the fact that CATV companies are incorporated under Article 3 of the Transportation Corporations Law. The Public Service Law, however, is very specific as to the type of companies and undertakings that may be regulated by the PSC. Also, the Legislature has removed CATV matters from the PSC's cognizance through Article 28 of the Executive Law.

14/ The PSC's jurisdiction even though limited may be quite penetrating. For example, the PSC could well order the removal of non-utility attachments when space was required for additional utility attachments and non-utilities could not be accommodated by rearrangements or change-outs.

Jurisdiction of the CCTV

Position of the Parties

The various utility parties and the Staff agreed that CCTV has no jurisdiction over utilities or the contracts here considered. Several of the briefs submitted contain a detailed analysis of Article 28 of the Executive Law with the conclusion that CCTV has no jurisdiction over utilities or any other supplier of goods or services to CATV companies. It was maintained that CCTV has only limited powers over CATV companies, and the fact that CCTV is cooperating with the PSC in this proceeding in no way enhances or extends its authority. It was also argued that since Article 28 of the Executive Law was enacted after a decision was rendered in the Ceracche case, there is ample indication of legislative intent not to give CCTV jurisdiction over utilities.

The Petitioner agreed that CCTV is limited to the powers granted to it by the Legislature, but the Association took the further position that the Legislature has granted sufficient powers to that agency to regulate pole attachment and related agreements with the utilities. The Petitioner argued that because a particular subject was not specifically mentioned within the scope of Article 28 does not mean that the Legislature intended that CCTV should be precluded from addressing that subject. The Association has noted that CCTV has broad powers to accomplish the general policies set forth in the statute. One such policy is the promotion of the rapid growth of the CATV industry. It was argued that the use of existing

pole plant is a necessity for the growth of cable and that utility attachment practices can frustrate this purpose. In the Association's view, therefore, it is reasonable to conclude that the Legislature must have intended CCTV to have sufficient authority to regulate this critical area. In response to the utility-drawn analogy between themselves and other suppliers of goods or services, the Petitioner has noted that other suppliers are not monopolies possessed of pole and other plant absolutely essential to CATV's development.

Discussion

The jurisdictional scope of the Public Service Law has been interpreted frequently. Being of recent origin, Article 28 of the Executive Law has not been the subject of similar interpretations. Review of the scope of jurisdiction must be by analysis of appropriate provisions. Very briefly, those provisions bearing on the questions here extant are as follows:

Section 811. This section contains the declaration of legislative findings and intent. In part, this section states as follows:

> "There is, therefore, a need for a state agency to develop a state telecommunications policy; to promote the rapid development of the cable television industry responsive to community and public interest and consonant with policies, regulations and statutes of the federal government; to assure that cable television companies provide adequate, economical and efficient service to their subscribers, the municipalities within which they are franchised and other parties to the public interest; and, to encourage the endeavors of public and private institutions, municipalities, associations and organizations in developing programming for the public interest."

Following its declaration of need, the Legislature declared its intent which included, inter alia, the vesting authority in an independent commission to oversee development of the CATV industry in this state in accordance with a statewide service plan.

Section 812. This section deals with definitions and those definitions here pertinent are as follows:

> "(1) 'Cable television company' shall mean any person owning, controlling, operating, managing or leasing a cable television system within the state.
>
> "(2) 'Cable television system' shall mean any system which operates for hire the service of receiving and amplifying programs broadcast by one or more television and/or radio stations and any other programs originated by a cable television company or by another party, and distributing such programs by wire, cable microwave or other means, whether such means are owned or leased, to persons who subscribe to such service...."

Section 813. This section concerns the application of Article 28 of the Executive Law and, in pertinent part, states that the provisions of that article shall apply to every cable television system and every cable television company operating within the state.

Section 815. This section outlines the duties of CCTV and sets forth a list of 11 different areas in which those duties shall arise. Areas here pertinent are:

"(1) Develop and maintain a statewide plan for development of cable television services, setting forth the objectives which the commission deems to be of regional and state concern;

"(2) To the extent permitted by, and not contrary to applicable federal law, rules and regulations:

* * *

"(d) prescribe standards for the construction and operation of cable television systems, which standards shall be designed to promote (i) safe, adequate and reliable service to subscribers, (ii) the construction and operation of systems consistent with the most advanced state of the art,..."

* * *

Section 816. This section sets forth the powers of CCTV which, in pertinent part, are as follows:

"(3) The commission may examine, under oath, all officers, agents, employees and stockholders of any cable television company, municipal officials and any other persons and compel the production of papers and the attendance of witnesses to obtain the information necessary to administer the provisions of this article.

"(4) ... The commission may enter into ... cooperative arrangements with the public service commission, ... as shall be necessary or appropriate to assure that ... the purposes of this article will be effectively accomplished.

"(5) The commission shall have and may exercise all other powers necessary or appropriate to carry out the purposes of this article."

Section 824. Dealing with the requirement for adequate service this section contains, inter alia, the following provisions:

> "1. Every cable television company shall provide safe, adequate and reliable service in accordance with applicable laws, regulations and franchise requirements.
>
> "2. Whenever, upon complaint or upon its own motion, and after public notice and opportunity for hearing, the commission finds that, despite its economic feasibility, the construction or operation of a franchised or certificated cable television system has been unreasonably delayed or that the extension of service to any persons or area within a cable television company's territory has been unreasonably withheld, it may order such construction, operation or extension on such terms and conditions as it deems reasonable and in the public interest."

A reading of these various provisions amply indicates that the Legislature intended to impose jurisdiction over cable companies and cable systems and nowhere else. The seemingly broad power to order construction where necessary as set forth in Section 824, is placed in its proper context by a review of the penalty provision also set forth in that section. Penalties which may be incurred are the denial, suspension or revocation of the right to exercise a CATV franchise or to operate pursuant to a certificate of confirmation. It seems clear upon a review of the several provisions cited above that CCTV has been given no authority to exercise jurisdiction over utilities or over any pole attachment or related agreements to which the utilities are parties.

The Petitioner's position, however, is bottomed on the proposition that there are provisions wherein CCTV has been given broad power to promote the development of CATV and that it is reasonable to assume that the Legislature must have intended CCTV to act effectively in an area as critical as pole attachments. The Association's position is untenable and contrary to the obvious interpretation of Article 28 of the Executive Law.

Aside from the limitations set forth in Article 28, or to be reasonably drawn from the term and tenor of that Article, the conclusion here reached is compelled by the fact that utilities are fully answerable to the PSC for the safety and adequacy of service. While the various public interest considerations surrounding CATV are fully appreciated, the jurisdiction of the PSC over utilities is most critical not only because utilities are natural monopolies, but because their jurisdictional services are essential to public health and safety. These basic and overriding considerations could be severely compromised if utility plant were subject to regulation by an agency not charged with responsibility for the rendition of utility services. Furthermore, the utilities could be the subject of conflicting orders and directives which, at best, could lead only to confusion and disorder. In any given case, an action which was intended to promote the interest of CATV could well be detrimental to telephone or electric service.

The conclusion here reached is underscored by the fact that jurisdiction of CCTV is limited even with respect to CATV companies. Certainly, regulatory jurisdiction exists, but Article 28 is not a comprehensive regulatory scheme as is the Public Service Law, for example. While Article 28 confers some regulatory powers, in large part it is a promotional statute vesting CCTV with a mandate to advance the interests of the CATV industry.

Finally, mention will be made of the argument raised by the Association, to the effect, that the type of regulatory structure established by Article 28 is analogous to that established at the federal level by the Communications Act of 1934, as amended 47 USC Section 151 et seq. (the Act). Citing the case of United States v. Southwestern Cable Company, 392 U.S. 157 (1968) the Petitioner has noted that the FCC exercises jurisdiction over CATV even though there is no mention of that service in the Act.

The FCC exercises jurisdiction over both communications common carriers (telephone and telegraph companies) and broadcasters. After the advent of CATV the FCC refused on different occasions to assume jurisdiction over the new industry, and it was expected that the Congress would enact remedial legislation. When Congress did not act, the FCC assumed jurisdiction which assumption was challenged in the Southwestern Cable Company case, supra. In sustaining the assumption of jurisdiction, the Supreme Court relied very heavily on Title I of the Act. Therein the Congress stated its purposes which

SUBSTANTIVE ISSUES

Issues Raised by the Association on Opening Brief

In its opening brief of December 31, 1975, the Association has restated many of the contentions originally raised in its Petition for Investigation. It is important to remember, however, that the arguments raised on brief are directed against the policies and practices of NYT and to a lesser extent against Niagara Mohawk. No other utility was singled out in the Petitioner's opening arguments.

As its first major point, the Association has argued that the ownership of poles by the utilities gives them enormous monopoly power which has been abused to bring about anti-competitive pole attachment agreements. In support of this contention, it was argued that because CATV operators have no choice but to use utility poles, they are forced into signing agreements that no prudent businessman would ordinarily sign. While a few CATV companies erected pole plants during the 1950's, many firms cannot now obtain permission to set poles. For environmental reasons local authorities will not permit the duplication of pole systems. It was argued that CATV is at the mercy of the utilities, therefore, and CATV firms cannot bring about any changes in the terms of the pole attachment agreements. It was further argued that pole attachment agreements are not negotiated between CATV and NYT; the agreements are processed by NYT.

were, inter alia, to regulate interstate and foreign commerce in communication by wire and radio and to make available a rapid, efficient, nationwide and worldwide wire and radio communication service. The Court noted that Congress expected the FCC to serve as the "single Government agency" with "unified jurisdiction" and "regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio."

No reasonable analogy can be drawn between the FCC and CCTV or between the Act and Article 28.

Section 816(3) of Article 28 of the Executive Law grants to CCTV the power to investigate matters of obvious concern to it in the exercise of its duties. It is here concluded that such a grant of power is broad enough for CCTV to investigate relationships between CATV and utilities. Such an investigation may be necessary and helpful to CCTV in the performance of its other duties, or it may be required as a base for requesting the Legislature for any remedial legislation that may appear proper and appropriate after the investigation is completed. It is further concluded, however, that the jurisdiction of CCTV does not extend beyond the power of investigation with respect to those relationships. In other words, CCTV has no jurisdiction over utilities or over pole attachment and related agreements between the utilities and CATV companies.

Under another provision considered objectionable, it was noted that CATV firms can be forced to pay a second makeready charge as a result of a utility attachment subsequent to the CATV attachment. With reference to the WHEREAS clause it was observed that within this clause CATV has agreed that its use will not interfere with NYT service requirements, but NYT has the exclusive power to determine when this occurs.

Turning to the issue of termination and the Niagara Mohawk agreement, the Petitioner stated that Niagara Mohawk can revoke pole licenses and that the utility can terminate the attachment agreement upon 90 days notice whereupon CATV must remove its facilities within that period at its own expense. The Association acknowledged that Niagara Mohawk has never exercised this power, but the point raised was that Niagara Mohawk could do so at its absolute discretion. The Niagara Mohawk agreement has no fixed duration.

With reference to Appendix 2 of the NYT agreement (specifications), the Association noted that this appendix purports to set forth the manner in which CATV firms are obligated to maintain their attachments on NYT poles. But, it was argued, these specifications do not contain sufficient detail to apprise CATV firms adequately of the manner in which they should maintain their attachments. As a practical matter, the Petitioner urged, this leaves NYT with complete discretion with respect to compliance.

Relying on testimony developed through NYT's witness, the Petitioner presented examples of CATV's inability to bargain with the utilities. It was noted that if a CATV company is not satisfied with a makeready estimate, review of that estimate can be had only through NYT's outside plant engineer. Furthermore, it was argued, the pole attachment agreement is modified only when NYT wishes to change provisions. As an example, the Association noted that NYT had shortened the term of the agreement from five years to one year whereas other licensees, such as municipal users, still have agreements with a five-year term. CATV firms, it was argued, have no option but to accept the shorter term agreement. Referring to specific contract provisions, the Petitioner noted that NYT regards CATV's use of the poles as secondary, and that the agreement is a mere accommodation to the licensee. As an example of CATV's secondary status, the Association pointed to a delay in obtaining an agreement within the City of Cohoes because NYT and Niagara Mohawk had a dispute which was being arbitrated. The Association argued that the development of CATV systems should not be delayed because of disputes to which those firms are not parties.

Pointing to specific provisions appearing in NYT's pole attachment agreement, the Association offered examples of what it regarded as an abuse of monopoly power. In this connection, it was noted that under the present agreement NYT can terminate use, it can terminate the agreement if attachment by CATV is not made within 90 days of licensing, and that it can terminate use for individual poles.

the same vices as the pole attachment agreement. The Petitioner has contended that because the terms of the one agreement offered are so onerous, only 16 underground agreements have been signed by CATV companies.

The third major point raised in the Petitioner's opening brief is the contention that NYT has historically misused monopoly power over poles to act in an anti-competitive manner. Citing the case of Better TV, Inc. v. New York Telephone Co., 31 FCC 2d 939 (1971), the Association observed, in effect, that the FCC found that NYT's pattern of conduct was to induce independent CATV operators to take the Company's unwanted channel distribution service or to delay the construction of CATV systems until channel distribution facilities could be constructed and customers obtained. Thus, the Association has argued, NYT is no stranger to anti-competitive conduct; FCC action was necessary to force relaxation of anti-competitive practices pursued by both NYT and its parent, the American Telephone & Telegraph Corporation.

Turning to surveys and makeready work, the Petitioner has argued that the practices of both NYT and Niagara Mohawk are unreasonable and anti-competitive. After repeating some points raised earlier in its brief, the Association noted that, based upon a study of poles surveyed between September, 1973 and September, 1974, the average cost for a survey conducted by NYT is $2.38 per pole. If NYT's workload so demands, it will employ a contractor to conduct a

Turning to what it saw as abuses in the administration of pole attachment agreements, the Association itemized several grievances. It was noted that NYT will submit disputes to arbitration, but it refuses to arbitrate with CATV.[15/] In those limited instances when NYT permits the use of a private contractor to perform a pole survey, the costs are recalculated based upon NYT's loaded hourly labor rates, and the CATV company is charged on that basis. The Petitioner argued that there is nothing in the pole attachment agreement to support this interpretation of the contract. While CATV companies would prefer monthly billing, NYT has refused to institute this practice. With reference to surveys, it is NYT's policy to require advance payments for this work although the pole attachment agreement is silent on the point. The Association also argued that NYT consistently overestimates makeready work, and, accordingly, larger advance payments are made than the actual cost of makeready. Stating that it is NYT's announced policy to notify CATV companies when a survey is scheduled to be taken, the Petitioner contended that frequently no notification is given so the CATV company has no way of knowing whether the survey is accurate. Another administrative problem that CATV has is the frequent transfer of NYT field personnel with whom CATV must work on a daily basis. This fact complicates and confuses the interpretation of pole attachment agreements.

As its second major point, the Association has argued that as a result of NYT's monopoly power its underground agreement possesses

15/ Reference was made to one example where NYT was in the process of arbitration with Niagara Mohawk. Witness Ehgborg testified that it was Company policy not to arbitrate where hazardous conditions exist.

survey, but the cost to the CATV company is the same as if NYT's employees conducted the survey. The contractor's survey charges to NYT are recalculated (based upon NYT's loaded hourly labor rates) and this charge is assessed against the CATV company. It was noted that Niagara Mohawk's policy is to provide the CATV company with an estimate of the makeready charge on each pole during the survey while NYT pursues a policy where the makeready estimate is provided after it has been recalculated. The Petitioner noted that NYT's policy works to the disadvantage of CATV companies because those companies are interested in ascertaining as quickly as possible the most economical way to rearrange a pole. Citing the record, the Association argued that, compared to Niagara Mohawk's charges, NYT's survey costs are unreasonably high. As an example, it was noted that NYT charged $160 for the same survey that Niagara Mohawk charged $50. The Petitioner further charged that when NYT performs a CATV survey, it is also inspecting its own plant. In effect, therefore, CATV companies are paying NYT's fully loaded costs for the discovery of violations on NYT's plant. It was also argued that Niagara Mohawk inspects its own plant while performing CATV surveys.

With respect to makeready work the Association noted that Niagara Mohawk does not require advance payments. This utility uses its own employees for surveys, but will also use contractors where required. In this instance the CATV company pays the actual cost billed to Niagara Mohawk and payment is made after completion of

the work. In contrast, NYT requires an advance payment for makeready work and it refuses to employ contractors in those cases where the Company is unable to meet CATV's timetable for makeready work.

According to the Petitioner, one of the worst features of NYT's makeready procedure is its absolute unwillingness to deliver a specified number of poles within a specified period of time. It was argued that this policy places CATV companies at the mercy of NYT regarding the scheduling and completion of makeready work without which no CATV system can be constructed. With reference to NYT's advance payment policy, the Association stated that NYT will waive this policy when in the Company's best interest as, for example, when CATV cable has to be moved for NYT's convenience.

When makeready work has been performed, Company policy calls for a CWO to be provided to the CATV company requesting the work. Again citing record references, the Association stated that, notwithstanding NYT's policy to furnish this documentation, NYT employees have consistently refused to make CWO's available. It was further contended that even when CWO's are supplied, it is often impossible to tell from these documents what makeready had to be performed. Noting that NYT has taken the position that CATV can send an employee of its own to observe the survey and thereby know what makeready work is required, the Association questions why it should bear this additional expense in addition to having to pay the cost of the survey. In a related matter the Petitioner noted that it

has no way of effectively monitoring the efficiency of NYT crews performing makeready because CATV does not have sufficient information available to make an informed judgment.

Another aspect of NYT's makeready policy cited as undesirable is that NYT can determine the speed at which a CATV system is constructed through limitations on the number of poles surveyed and the number of poles rearranged. Citing Company policy, to the effect, that CATV construction must fit into NYT's established "basic scheduling practices", the Petitioner argued that makeready work is thereby precluded from being performed in a continuous manner. The Association urged that this procedure is inconsistent with CATV's development because the resulting isolated "pockets" prevent the system from being constructed logically and continuously.

The Petitioner has taken strong exception to NYT's policy of adding 10 percent to labor charges on makeready work. The Association has urged that this 10 percent profit feature is an illustration of the arbitrary manner in which NYT administers pole attachment agreements. In this connection, it was noted that this element of profit was not imposed under former pole attachment agreements. Taking issue with the Company's claim that 10 percent profit is comparable to contractor expectations, the Petitioner argued that NYT's loaded labor costs are much higher than those of a contractor. Another objectionable aspect of the profit element was that CATV companies are helping to pay the cost for NYT to improve its plant. In this connection it was observed that the profit element appears in makeready charges when poles are changed-out.

With respect to Niagara Mohawk, the Association has noted that it does not add a 10 percent profit to makeready work nor does it receive any profit from this work. The Petitioner considers Niagara Mohawk's policies to be preferable to those of NYT, but, nevertheless, it was argued that the record in this proceeding reflects substantial makeready overcharges by Niagara Mohawk.

As its next major point the Petitioner argued that CATV systems are the victims of consistent delays resulting from NYT and Niagara Mohawk practices. In this connection, it was contended that the greatest delay is in the completing of makeready work; it is never known how long it will take NYT to license a pole. As to Niagara Mohawk the Association stated that there were delays in answering correspondence and a case of delay in completing makeready work for a CATV company in the Albany area was cited.

A major point in the Petitioner's argument was in the area of guying and anchoring where utility practices are considered to be arbitrary. Under its current pole attachment agreement, NYT has the option of whether it or the CATV licensee should guy and anchor. The Association stated that prior to the initiation of this proceeding, there were no problems between NYT and CATV companies with respect to guying and anchoring. It was during this proceeding, according to the Petitioner, that NYT announced the policy of requiring CATV companies to place their own guys and anchors and to refrain from attaching to NYT anchors even if there were spare capacity on these

anchors. Thus, NYT's policy has gone from one where it performed guying and anchoring on behalf of the CATV companies to one where it now requires CATV companies to place their own guys and anchors wherever that additional protection is required. Niagara Mohawk will permit CATV to attach to its guys and anchors, but if sufficient capacity is not available, Niagara Mohawk will not install larger guys and anchors as part of the makeready work.

Stating its belief that the utilities intend to punish CATV for initiating this proceeding, the Association argued that easement and right-of-way issues have been used as a weapon to this end. The Petitioner has observed that NYT's policy is that it obtains whatever right-of-way is required for itself when construction is required over private property. It is not NYT's policy to obtain right-of-way for CATV, nor does the Company assign its existing right-of-way to CATV.[16/] The Association further pointed out, however, that in those years when NYT did all guying and anchoring work, it did not require CATV to obtain prior permission from landowners. During this time NYT was not concerned about right-of-way issues nor was the Company concerned about obtaining landowner permission when it was constructing CATV systems for lease-back operations. The concluding point was that NYT's present policy with regard to guying and anchoring has made right-of-way issues critical to CATV companies.

16/ It was in this connection that the Petitioner cited the case of Hoffman v. Capital Cablevision Systems, Inc., supra.

The Petitioner has further argued that NYT's policy regarding inspections is arbitrary. Under the terms of the pole attachment agreement, NYT can inspect CATV plant whenever it chooses and at CATV's expense. The Association noted that NYT's municipal agreement provides a fee limitation of $2 per pole per year on such inspections, but that no such limitation exists with respect to pole attachment agreements offered CATV companies. Repeating its contention that NYT inspects its own plant at the same time that it inspects CATV attachments, the Petitioner cited the testimony of NYT's witness, to the effect, that it is not the Company's policy to charge CATV for inspections of NYT's plant. It was urged that NYT employees do not follow this policy.

In support of this contention the Association has argued that the violations in NYT's plant are more substantial than the Company would have others believe. Reference was made to the testimony of Barry Wilson, an employee of Jackson Communications Corporation (Ohio), who conducted a survey of telephone plant on which there were no CATV attachments. As a result of this random survey, Witness Wilson discovered a number of violations that were reported during the course of his testimony. In view of this testimony, the Petitioner has argued that NYT's contention that inspections of CATV attachments, at its expense, are necessary and justified is a specious contention.